

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of

Amendment of the Commission's Rules
to Establish New Personal Communications
Services

)
)
) GEN Docket No. 90-314
) ET Docket No. 92-100
)

COMMENTS

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November 9, 1992

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EXECUTIVE SUMMARY

Express Communications, Inc. ("Express") fears that the adoption of a licensing system for Personal Communications Services ("PCS") based on competitive bidding would undermine the Commission's efforts to bring truly innovative, spectrally efficient personal communications services to the public without undue delay. Simply put, it is not possible for the Commission to craft a workable system of competitive bidding that would still permit the country's smaller, but highly creative firms a full and fair opportunity to serve as PCS licensees. However, Express believes that it is possible for the Commission to implement lottery rules that will preclude speculation and expedite service to the public, while preserving opportunities for smaller entrepreneurs who deserve a chance to participate on an equal basis in the allocation of radio spectrum for PCS. Therefore, Express proposes that future PCS licenses be awarded based on a reformed lottery system. Under Express' proposal, the Commission would utilize higher filing fees, heightened entry criteria (including firm financial requirements), tough construction schedules, and restrictions on trafficking (including transfer fees paid to the government) to deter speculative applications and eliminate undue delay in licensing.

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COMMENTS

Express Communications, Inc. ("Express"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submits its initial comments in response to the *Notice of Proposed Rule Making and Tentative Decision* (the "Notice") released by the Commission on August 14, 1992 in this proceeding.¹ While Express applauds many of the Personal Communications Services ("PCS") rules proposed in the *Notice*, Express is concerned that the adoption of a licensing system for PCS based on competitive bidding would undermine the Commission's efforts to bring truly innovative, spectrally efficient personal communications services to the public expeditiously.

I. INTRODUCTION AND STATEMENT OF INTEREST.

Express is a Dallas-based firm that provides a variety of consulting and management services to entrepreneurial investors in the communications industry and, through a subsidiary, is involved in the acquisition, construction and management of wireless communications systems. For the past year, Express has been a leading proponent on Capitol Hill and before the Commission for the use of a reformed lottery

¹*Amendment of the Commission's Rules to Establish New Personal Communications Services*, 7 FCC Rcd 5676 (1992)[hereinafter cited as "Notice"].

system, rather than auction, to award spectrum for new technologies.² As such, Express and its clients have a vital interest in the subject matter of the *Notice* -- the manner in which the Commission allocates spectrum for new communications services and the rules and policies that will govern the offering of those services to the public.

With the *Notice*, the Commission makes a persuasive case for the reallocation of spectrum for PCS. As the burgeoning market for cellular telephones, pagers and like devices establishes, a substantial portion of the American public demands access to communications service untethered to the traditional wireline network. The Commission is certainly correct in concluding in the *Notice* that "[t]here is steadily increasing consumer and business interest in new mobile services and technologies for numerous, sometimes incompatible, applications."³ The allocation of spectrum for a variety of mobile services to be offered under the PCS banner, many of which are today unknown, should go far both "to ensure that all mobile services are provided with the

²See, e.g. Comments of Express Communications, Inc., RM-7985 (filed July 17, 1992)(opposing Fleet Call support for use of auctions to award licenses for 800 MHz Specialized Mobile Radio facilities"); "Company Offers Unique Alternative To Auctioning Drafts Floated In Senate, *Washington Telecom Week*, at 3-4 (July 3, 1992); "Express Communications Has Proposed Alternative", *Communications Daily*, at 5 (June 16, 1992); "Spectrum Licensing In The '90s: Can We Find A Way?", Remarks of Ervin S. Duggan before the American Mobile Telecommunications Association SMR Leadership Conference, at 7-8 (June 24, 1992)[hereinafter cited as "Spectrum Licensing In The '90s"].

³*Notice*, *supra* note 1, 7 FCC Rcd at 5687.

highest quality at low-cost, reasonable rates to the greatest numbers of consumers" and to assure that PCS is introduced as expeditiously as possible.⁴

If PCS is to become viable in the marketplace rapidly, significant technological advancements will be required. Given the rules and policies announced in the recent *First Report and Order and Third Notice of Proposed Rule Making* in ET Docket No. 92-9 designed to protect existing point-to-point microwave users of the spectrum targeted for PCS usage,⁵ the most important determinative of how rapidly PCS is introduced to the public will likely be whether technological innovation permits PCS systems to share spectrum with existing point-to-point microwave users. Express believes that if the technological advances necessary to bring PCS to the marketplace rapidly are to become reality, smaller firms must not be precluded from participating as PCS licensees.

As a result, Express parts company with the *Notice* with respect to the rules and policies that should govern the licensing of PCS systems. Simply stated, Express opposes the Commission's proposal to request authority from Congress to award PCS authorizations through auctions. Make no mistake, Express agrees with the Commission that the present comparative hearing and lottery systems are inefficient mechanisms for

⁴*Notice*, *supra* note 1, 7 FCC Rcd at 5679.

⁵*Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, FCC 92-437, ET Docket No. 92-9 (rel. Oct. 16, 1992).

awarding licenses.⁶ Comparative hearings are costly and invariably engender delay. And, too often, the regulatory environment associated with lottery services has led to rampant speculation in applications.⁷ However, unlike those who are advocating the use of auctions, Express believes that it is possible for the Commission to implement lottery rules that will preclude speculation and delay, while preserving opportunities for smaller entrepreneurs to participate on an equal basis in the allocation of radio spectrum for PCS.

II. DISCUSSION

A. The Prospects For The Earliest Possible Introduction of PCS Will Be Adversely Affected If Innovative Small Companies Are Effectively Precluded From Serving As PCS Licensees.

It is evident from the statements accompanying the *Notice* and other public pronouncements of virtually every member of the Commission that a strong desire exists to assure that smaller entities are afforded a full and fair opportunity to participate as PCS licensees.⁸ This is how it should be, particularly since the Commission is licensing

⁶See *Notice*, *supra* note 8, 7 FCC Rcd at 5764-65.

⁷See, e.g. *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services*, 7 FCC Rcd 898 (1992); *Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 7 FCC Rcd 3266 (1992).

⁸See *Notice*, *supra* note 2, 7 FCC Rcd at 5773-74 (Separate Statement of James H. Quello)("I am concerned about the ability of small businesses to compete for spectrum under an auction proposal"); *Id.* at 5776 (Statement of Commissioner Sherrie P. Marshall)("I have no desire to preclude small businesses from entering the PCS arena"); *Id.* at 5777 (Separate Statement of Commissioner Andrew C. Barrett)("I seek a service where several new participants, both large and small, will have the ability to compete
(continued...)")

services that are still in their embryonic stages and require the creativity that America's smaller entrepreneurs can best provide.

Simply put, if the Commission decides to employ competitive bidding to award PCS licenses, and Congress authorizes the Commission to do so, small but highly innovative firms likely will be foreclosed from serving as PCS licensees. That there is a direct relationship between the willingness of a given firm to devote creative energies to new communications technologies and the likelihood that that firm will secure operating authority was established beyond peradventure when the Commission adopted its pioneer's preference program.⁹ Unless smaller firms are afforded an opportunity to secure PCS authorizations, they will turn their creative efforts elsewhere.

That would be unfortunate for those who are demanding new mobile communications services. As Commissioner James H. Quello rightly noted in his separate statement accompanying the *Notice*, those with the deepest pockets do not always have the most innovative ideas where technology is concerned.¹⁰ Indeed, an advantage that larger communications companies will inevitably have over small new entrants is the

⁸(...continued)
in the PCS market"); "Spectrum Licensing In The '90s", *supra* note 2, at 7-8 ("Under any new system, we need to give new entrants and smaller players a fair and full chance to compete").

⁹*See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 FCC Rcd 3488, 3490 (1991)[hereinafter cited as "*Pioneer's Preference Order*"].

¹⁰*Notice*, *supra* note 1, 7 FCC Rcd at 5774.

ability to bid higher because they can achieve economies of scale and scope through the use of existing equipment -- equipment that likely is not state-of-the-art. While these larger companies would have lower capital costs because of their ability to use in-place plant, that plant likely could not offer the full range of advanced service that a PCS system built anew can offer.

The Commission should not lose sight of the fact that some of the most significant advances in the communications field have come from firms such as MCI Communications Corp., McCaw Cellular, Fleet Call, Vanguard Cellular, and Metro Mobile Communications, to name a few, that were once small, entrepreneurial companies. Particularly with a nascent service like PCS, it is essential that the Commission not foreclose technological innovation by effectively foreclosing smaller innovators from the opportunity to secure PCS licenses. Simply put, short term revenue raising must take a back seat to assuring that the American public have access to the most innovative, spectrally efficient PCS offerings available.

At the same time most of the Commissioners have espoused a need to preserve opportunities for smaller entrants to offer PCS, they have also made clear that if lotteries are to be employed to enhance the prospects of smaller entities, significant reformation of the lottery system is necessary to avoid speculation and resulting regulatory delay.¹¹ Express agrees. In Express' view, it is not lotteries *per se* that promote the filing of speculative applications and the resultant delay in application

¹¹See *infra* note 8.

processing. Rather, history has shown that it is the totality of the regulatory environment surrounding a service that dictates whether speculative applications will be filed. Where entry requirements have been high and the prospects for a quick profit low, speculative applications have not been a major problem. Indeed, a comparison of the Commission's experience regarding the licensing of nationwide 220-222 MHz systems with the licensing of local 220-222 MHz systems is proof positive that the Commission can combine high filing fees, strict entry criteria, financial requirements, construction deadlines and restrictions on license assignments to minimize speculative applications and assure the licensing of qualified entities.¹² By crafting a regulatory framework for the licensing of PCS that is not conducive to speculative applications, the Commission can retain all of the benefits of a lottery system, without either the administrative burdens and delays associated with speculative applications or the problems identified with auctions.

B. Auctions Are Not A Tonic For The Lottery System's Ills.

Will auctions prove to be the panacea for the licensing delays brought on by speculative applications? Express doubts it. As a practical matter, it is simply impossible to develop a competitive bidding system that will expedite the introduction of service, while also satisfying the goal of assuring smaller entities a full and fair opportunity to participate in the marketplace as PCS licensees. In an apparent effort to address the needs of small businesses, Appendix E to the *Notice* advances two alternative

¹²*Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services*, 7 FCC Rcd 4484 (1992)[hereinafter cited as "220-222 MHz MO&O"].

payment methods that would permit the deferral of payments by successful bidders.¹³

Yet, on analysis, neither approach is particularly satisfying.

First, Appendix E suggests that the Commission permit payments over a three year period.¹⁴ Presumably, the reasoning behind such an approach is that smaller bidders could anticipate the use of system revenues to make payments once the system is operating. In reality, however, the larger bidders will still be able to tender higher bids, since they will be able to bring their existing wealth to bear. Their bids will inevitably rely not only on anticipated revenues from the first three years of system operations, but will use their existing resources to bid higher in anticipation of profits beyond the first three years of operations.

Second, Appendix E suggests that the Commission accept an up-front payment and royalties at a fixed rate.¹⁵ While in theory such a system creates a somewhat more level playing field between large and small bidders, in practice the results will likely be otherwise. Once again, larger companies would have an advantage. Obviously, those with greater existing wealth could tender bids with higher initial payments. Moreover, if the Commission permits bidders to propose different royalty rates, the larger firms would be less adverse to proposing higher royalty rates, since they could subsidize mistakes from the revenues of other ventures. In any event, as the

¹³See Notice, *supra* note 1, 7 FCC Rcd at 5768.

¹⁴See *id.*

¹⁵See *id.*

Commission forthrightly recognizes in Appendix E, where "royalties are based on the output or revenues of the winning firm, they will act as a tax on incremental production and therefore tend to reduce output."¹⁶ The result could well be less efficient use of the spectrum.

Additionally, allowing deferred financing bids to be considered as suggested in Appendix E would exacerbate rather than resolve the problems of undue delay, litigation and speculation that have led to the current frustration with random selection as a vehicle for choosing licensees. In Appendix D to the *Notice*, the Commission appears to conclude that competitive bidding would reduce delay because fewer applications will be submitted.¹⁷ That conclusion, however, is belied by the facts. Depending on how the Commission structures a deferred financing system, the acceptance of deferred financing bids will likely result in a new comparative hearing process for the Commission to determine which applicant's bid is "best". If the Commission provides the sort of flexibility in bidding that smaller entities require, it is a virtual certainty that bids will differ in the timing and method of payment. A well-financed communications company may offer to pay a specified amount immediately to acquire the licenses whereas other sincere yet less well-financed applicants may have no choice but to fund their bids out of operating revenues over a number of years. The combinations imaginable for the funding of bids are endless. It is inevitable that the Commission will

¹⁶*Id.*

¹⁷*See id.* at 5764.

face a difficult, time-consuming task in determining which is the "best" offer and in evaluating the present and future monetary values of those bids.

What Appendix D ignores, moreover, is that the well-financed companies that do not prevail will be more prone to litigate the results of the competitive bidding process at the Commission and in the courts until all avenues of redress are exhausted. Due to the subjective decisions the Commission will be forced to make in awarding licenses, this process will invite petitions to deny from disgruntled "lower" bidders and endless litigation among applicants, many of whom almost by definition would be well-financed and determined to obtain a particular license. The primary purpose of auctioning spectrum -- expediting service to the public -- will be undercut if post-auction adversarial proceedings cause delays in making spectrum available to applicants who can begin rapid deployment of service.

C. A Reformed Lottery System Can Deter Speculative Applications And Raise Funds, Without The Problems Associated With Auctions.

Earlier this year, in response to the invitation of the staffs of Senators Inouye and Stevens, Express provided the Senate Subcommittee on Communications written testimony addressing the proposal to give the Commission auction authority in the "Spectrum Competitive Bidding Amendment" to S. 218, the Emerging Telecommunications Technologies Act of 1991. In that testimony, Express sets forth the public interest benefits of an alternative -- a reformed random selection process that employs higher filing fees, additional entry criteria, minimum holding periods and

transfer fees to deter speculation while raising revenues. Attached as Exhibit A is a copy of that testimony. Soon afterward, Commissioners Quello and Duggan embraced the call for the Commission to consider alternatives to auctions to deter the filing of speculative applications.¹⁸ With the release of the *Notice*, the chorus of support for a reformed lottery process has reached a crescendo.

Express believes that adoption of its proposals would deter, if not eliminate, speculative applications and thus reduce the cost of spectrum assignment both in terms of the time necessary to allocate licenses and the amount of money the Commission must spend on administering the application process. It would be a grave error for the Commission to adopt the "postcard lottery" approach raised in Paragraph 85 of the *Notice*, for the benefits are elusive, at best.¹⁹ While such an approach reduces the costs of preparing each application, legitimate applicants would no doubt prefer to prepare more detailed applications under a lottery system that eliminates the speculative filers. And, while the cost of preparing, handling and storing any given detailed application will no doubt exceed that of preparing, handling and storing a postcard, the volume of postcards likely would be such that any cost savings are ephemeral. Instead, By implementing the stricter standards proposed by Express for PCS applicants, most of the problems associated with the lotteries previously conducted by the Commission to allocate

¹⁸Spectrum Licensing In The '90s, *supra* note 2; 220-222 MHz MO&O, *supra* note 12, at 14 (Separate Statement of Comm. Quello).

¹⁹*Notice*, *supra* note 2, 7 FCC Rcd at 5708.

communications licenses would be resolved and significant funding for governmental activities could be achieved.

Express believes that there are five key elements that should be adopted by the Commission in order to deter speculative PCS applications under a lottery system. First, the filing fee for PCS applications should be set at a sufficiently high level as to deter speculative filings. The Commission's recent experience in the 220-222 MHz band is illustrative of how effective filing fees can be in deterring speculative filings. While approximately 57,000 applications were filed for the local 220-222 MHz authorizations which required only a \$35.00 filing fee, just 174 applications were submitted for the nationwide authorizations which required filing fees of \$12,250.00. Set the filing fees for PCS authorizations high enough, Express submits, and speculation will be deterred.

Unfortunately, because it is uncertain how large service areas will be, how many cell sites will be required to serve the typical service area, and whether PCS will be regulated as a common carrier or private service, it is impossible to predict whether the filing fee structure proposed in Paragraph 89 of the *Notice* will prove effective. Express recognizes that the Commission is constrained by Section 8 of the Communications Act of 1934, as amended, (the "Communications Act") in its ability to set filing fees above certain Congressionally established levels.²⁰ Express urges the Commission, if necessary, to request that Congress amend the Communications Act to afford it greater flexibility to establish filing fees designed to deter speculative

²⁰47 U.S.C. § 158.

applications. Otherwise, Express fears that legal challenges to the filing fee structure (such as is currently plaguing the Interactive Video and Data Service) will slow the introduction of PCS to the marketplace.

Second, the Commission should implement strict entry requirements to deter speculative PCS applications. Requiring the submission of detailed engineering information regarding the design and construction of the proposed system will undoubtedly deter speculative applications. Express believes each applicant for a PCS authorization should be required to include detailed system engineering in its applications and not be permitted to deviate substantially from its proposal except to demonstrably improve service to the public. In this fashion, the Commission can restrict lottery entry to those at least willing to develop a system engineering plan, while still permitting the eventual lottery winner to take advantage of subsequent technological innovation.

Third, Express believes that the imposition of strict financial entry requirements will be the key to deterring speculative PCS applications. The Commission should require every applicant for a PCS authorization to include with its application a business plan setting forth the applicant's plans for construction, management and operation of the proposed system, including plans for marketing, a construction timetable and *pro forma* financial projections. Each application should also be accompanied by a firm financial commitment consistent with the applicant's business plan *pro forma* financial projections and satisfying requirements similar to those set forth in Section

22.917(f) of the Commission's Rules -- requirements adopted to encourage only *bona fide* applicants to file applications.²¹

Fourth, the Commission should do as it has in other services of late and impose strict construction timetables on licensees in order to assure diligent efforts to introduce service to the public and deter warehousing by speculators. The timetable should require that each licensee execute a non-cancelable equipment purchase order within 90 days of the authorization grant date and have a set percentage of its service area covered by certain benchmark dates or forfeit its license. Extensions of time should only be grant if the licensee shows that the failure to complete construction is due to causes beyond its control.²²

Finally, but perhaps most importantly, the Commission should impose significant limitations on the assignment of PCS licenses and the transfer of interests in licensees. Specifically, a licensee of a PCS system be required: (i) to construct and operate the system for a minimum of one year before any sale, transfer or other disposition of greater than a 25 % interest can occur; and (ii) to construct and operate the system for a minimum of five years before a sale, transfer or disposition of 50.01 % or more can occur. Express proposes that these restrictions apply not only to actual

²¹See *Amendment of Part 22 of the Commission's Rules to provide for the filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules*, 6 FCC Rcd 6185, 6211-12 (1991)[hereinafter cited as "*Cellular Unserved Order*"].

²²See, e.g. *id.*, at 6224.

transactions, but also exclude the execution of an agreement (such as an option) prior to the expiration of the minimum operating period to effect such sale or transfer even if the closing of the sale or transfer would not occur until following the minimum operating period.²³

As part of its proposal to reform the lottery process, Express believes that the Commission should request from Congress authority to impose a transfer fee, calculated as a percentage of the gross sales price, upon each assignment of a PCS license or transfer of control of a PCS licensee.²⁴ The percentage would be greater in the earlier years to deter speculative applications and purchases of licenses. Upon each resale of a license, the "clock" would begin again with regard to the applicable fees. If

²³*See id.* at 6223.

²⁴Express believes these fees should be paid to a newly-created communications research and development agency. Such an approach will not only improve the state-of-the-art in communications, but assist United States telecommunications companies compete more effectively in the global marketplace.

the Commission adopts the minimum operating requirements Express proposes in the preceding paragraph, Express believes the transfer fees should be calculated as follows:

| Year Following Expiration of Minimum Operating Requirement | % of Gross Sales Price Paid to Govt. |
|---|---|
| 1 | 10% |
| 2 | 9% |
| 3 | 8% |
| 4 | 7% |
| 5 | 6% |
| 6 | 5% |
| 7 | 4% |
| 8 | 3% |
| 9 | 2% |
| 10 | 1% |

If, however, the Commission rejects the proposed restrictions on trafficking and instead permits licenses to be transferred freely, Express suggests that the transfer fees be calculated as follows:

| Year Following Construction | % of Gross Sales Price Paid to Govt. |
|-----------------------------|---|
| 1 | 25% |
| 2 | 21% |
| 3 | 18% |
| 4 | 15% |
| 5 | 12% |
| 6 | 10% |
| 7 | 7% |
| 8 | 5% |
| 9 | 2% |
| 10 | 0% |

Since, as the Commission is aware, the bulk of those filing speculative applications are attempting to derive a profit through quick resale rather than through operation, imposition of a sliding scale of transfer fees along the lines proposed by Express should substantially reduce the incidence of speculation.


III. CONCLUSION

In short, although the Commission should be applauded for its actions to bring PCS to market, the proposal to employ auctions is flawed. Rather than seek authority from Congress to utilize auctions -- a selection vehicle that is rife with potential problems -- the Commission should instead seek authority from Congress to impose a fee on the transfer of PCS authorizations and adopt the other proposals advanced by Express

to deter speculation and expedite the introduction of innovative PCS services to the public.

Respectfully submitted,

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November 9, 1992

**July 1992 Comments of
Express Communications, Inc.**

Before the Senate Subcommittee on Communications

**Regarding the Adoption of a
Dual Track Test Providing for the
Allocation of Radio Spectrum by Trial Auctions
as Compared to the Adoption
of a Reformed Random Selection Allocation Process**

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JULY 1992 COMMENTS
OF
EXPRESS COMMUNICATIONS, INC.
BEFORE THE SENATE SUBCOMMITTEE ON COMMUNICATIONS
REGARDING THE ADOPTION OF A DUAL TRACK TEST
PROVIDING FOR THE ALLOCATION OF RADIO SPECTRUM BY
TRIAL AUCTIONS AS COMPARED TO
THE ADOPTION OF A REFORMED
RANDOM SELECTION ALLOCATION PROCESS

Preface. We appreciate the opportunity to present additional written testimony to the Senate Committee on Commerce, Science and Transportation through its Subcommittee on Communications (the "Committee"). Express Communications, Inc. ("Express") enthusiastically supports Senator Inouye's bill, S. 218, which provides for the reallocation to public use of at least 200 MHz of government-controlled spectrum. We feel that the Committee is well aware of the positive benefits accruing to the public and the nation by virtue of this proposed "privatization" of spectrum.

Our testimony, therefore, will concentrate on addressing the issues regarding the amendment of the Communications Act of 1934 to allow for competitive bidding as proposed in Senator Stevens' and Senator Inouye's amendment of S. 218. Express proposes a unique dual track test comparing the results of the allocation of radio spectrum to the results obtained from implementing a significantly reformed random selection allocation process as proposed by Express in October 1991 and as set forth below.

INTRODUCTION

Express' Participation. Since last fall, Express Communications, Inc. has played an active role in providing the Senate Communications Subcommittee with comments on its various versions of S. 218 regarding the reassignment of 200 MHz of government spectrum and how this spectrum should be reallocated, whether by auction as in the most recently proposed amendment of Senators' Stevens and Inouye, by the FCC's current lottery process or by some other method.